Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's Rules	)	WT Docket 95-157
Regarding a Plan for Sharing the Costs	)	RM-8643
of Microwave Relocation	)	

U S WEST REPLY COMMENTS

U S WEST, Inc. below responds to those comments which oppose the Commission's proposals to improve its microwave relocation plan in connection with the three 10 MHz PCS bands (the D, E and F blocks).[1] Indeed, the comments convincingly demonstrate that the Commission has not gone far enough and that it should eliminate the voluntary negotiation period for these three blocks — at least if the Commission is committed to the rapid deployment of PCS and to the injection of additional competition into the market for commercial mobile radio services ("CMRS"). These changes will in no way compromise the legitimate interests of 2 GHz microwave incumbents because they will face no disruption to their service and, in fact, still "will often [be] better off after relocation."[2]

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[1] U S WEST takes no position regarding possible plan changes applicable to the C block PCS licenses. Because the need for modification of the relocation rules as applied to D, E, and F block PCS licensees is immediate, the FCC should not address in this proceeding application of the relocation rules to MSS licensees. *See* Joint Comments filed by Hughes, COMSAT, ICO and PCSAT.

[2] APCO v. FCC, 76 F.3d 395, 399 (D.C. Cir. 1996).

I. The Commission Should Eliminate the Voluntary Negotiation Period for the D, E, and F Blocks

The Commission has proposed to adjust the negotiation periods for the D, E, and F blocks by shortening the voluntary negotiation period by one year and by lengthening the mandatory period by one year. This approach, the Commission observes, could "accelerate the development of PCS in the D, E, and F blocks by speeding up the negotiation process and creating additional incentives for incumbents to enter into early agreements."[3]

Importantly, no one challenges the Commission's rationale for its proposal — namely, that adjusting the negotiation periods could accelerate the development of PCS in the three 10 MHz bands. The opponents to the proposal rather argue that the adjustment is unnecessary because "many" (but admittedly not all) microwave incumbents are willing to discuss relocation in good faith during the voluntary negotiation period.[4]

From what U S WEST can observe, "many" (if not most) microwave incumbents are willing to negotiate relocation in good faith during the voluntary negotiation period. And as CTIA notes, these (many) incumbents will not be impacted by the Commission's proposal because they will be able to conclude successful relocation negotiations regard-

[3] Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 95-157, FCC 96-196, at 45 ¶ 96 (April 30, 1996)("Further Notice").

[4] *See, e.g.*, UTC at 3-4; APCO at 4-5; William Wireless at 12; BellSouth at 3-5.

less of the length of the voluntary period — or even if voluntary period were eliminated.[5] Even during the mandatory negotiation period, incumbents will receive comparable (and brand new) systems and recovery of their recurring costs; in addition, they can receive a "premium" for moving their system before the involuntary relocation period.[6]

However, even the opponents to the Commission's proposal acknowledge that not all microwave incumbents operate in good faith and that during the voluntary negotiation period some incumbents will refuse to negotiate with PCS licensees.[7] The Commission's proposal will impact only these few "bad actor" incumbents for, as CTIA correctly observes:

> In fact, the only incumbents who will be hurt by a reduction of the voluntary period are a few "bad actors." The notion that these "bad actors" should be entitled to delay or "game" the relocation process is not recognized as a protected interest under the Communications Act, nor does the Commission intend it to be.[8]

It bears emphasis that even "bad actors" will be made more than whole. Like incumbents operating in good faith, "bad actor" incumbents will also recover their recurring costs, receive a comparable (and brand new) system, and can receive some premium

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[5] CTIA at 5.

[6] *See* New Rule 103.73, *reprinted in* Further Notice at B-13 to B-14. Given these facts, Tenneco's unsupported assertion that any reduction in the voluntary negotiation period would be "harshly inequitable to incumbents" (Tenneco at 4) is patently inaccurate. Similarly unsupported is the assertion that reducing the voluntary period "would simply hand prospective PCS licensees in the D, E and F blocks an additional competitive advantage over 2 GHz incumbents." APPA at 3.

[7] *See* Further Notice at 9 ¶ 16. *See also* New Rule 103.73, imposing an obligation to negotiate only after the mandatory negotiation period commences.

[8] CTIA at 5-6.

for moving.[9] The only interest these "bad actors" would lose by a reduction of the voluntary negotiation period is (a) a reduced opportunity to refuse to negotiate, and (b) some loss of the opportunity to extract patently unreasonable premiums (as opposed to so-called "reasonable" premiums defined in new Rule 101.73(b)(2)).

The commenters explain that the issue of microwave relocation can be far more important for 10 MHz licensees than for 30 MHz licensees because 10 MHz licensees have much less room (*i.e.*, one-third the spectrum) to maneuver around "bad actor" incumbents.[10] Because a single microwave link can block completely operation of a 10 MHz PCS system, the refusal of an incumbent to relocate (or even to discuss relocation during the voluntary period) will prevent a D, E, or F block licensee from commencing its service. The inability of a 10 MHz licensee to commence service because of a single "bad actor" licensee obviously can be devastating to the licensee — which, among other things, cannot begin to generate revenues to pay vendors (for system equipment) and to recoup the spectrum acquisition fees paid to the government.

In the end, though, it is the American public that is truly harmed by this situation. As CTIA notes, delays in the introduction of PCS impose real costs on society "in terms of competition, dynamic efficiency, and ultimately consumer welfare":

> Society, not just PCS providers, benefits by the rapid introduction of additional PCS services. Such benefits include increased competition, which results in lower prices and more choices for consumers. When one factors pos-

[9] *See, e.g.* Further Notice at 9 ¶ 15.

[10] *See, e.g.*, APC at 2-4; Omnipoint at 2-3.

> sible dynamic efficiency losses into the equation, a shorter negotiation period is the correct result.[11]

Giving a single microwave incumbent the power to block a 10 MHz licensee from even providing its service could, moreover, depress the prices paid for D, E, and F block licenses.

The Commission needs to understand that adoption of its proposal will have little practical benefit. Under current rules, a single (non-public safety) microwave incumbent can block a D, E, or F block licensee from using its spectrum and providing service to the public for four years or more; a single public safety incumbent can block service for six years or more.[12]

Little would change under the Commission's proposal. While the voluntary "I don't have to talk to you" period would be reduced, the mandatory period would be increased accordingly. A truly "bad actor" incumbent can find ways to stall negotiations during a longer mandatory period. Thus, even under the proposed rules, a single (non-public safety) incumbent could still block a D, E, or F block licensee from providing service to the public for four years or more; a single public safety incumbent could block service for six years or more.

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[11] CTIA at 6.

[12] A "bad actor" incumbent can refuse to negotiate during the voluntary negotiation period and drag its feet during the mandatory period as well as even during the involuntary relocation period. *See* Western Wireless at 2-5. The right to file a complaint for bad faith negotiations during the mandatory period may have marginal utility because of the practical delays associated with filing and processing a complaint.

Given that incumbents have already been on notice for almost four years of the need to relocate;[13] given that incumbents will face no service disruption, are assured of a minimum of full cost recovery, will receive brand new facilities, and will, as a result, "often [be] better off after relocation;"[14] given that a single incumbent can block a D, E, or F block license from even using its spectrum; and given that A and B block licensees already have a substantial head start (*albeit* under crippling relocation rules) over D, E, and F block licensees, the Commission should, as several commenters recommend, eliminate the voluntary negotiation period altogether for at least the D, E, and F block bands.[15] Ten MHz licensees which must pay for their spectrum deserve the opportunity to use it as quickly as possible, and the public deserves the benefit of the additional competition and innovative services which the D, E, and F block licensees will bring to the market.

As noted, the issue is not whether microwave incumbents will recover their legitimate relocation costs; the Commission's cost-sharing plan ensures full cost recovery — and more. The issue is rather whether a handful of incumbents will be permitted to extract outrageous "premiums" (*i.e.*, profits) under threat of delaying new services to the

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[13] *See* Emerging Radio Technologies Order, 7 FCC Rcd 6886, 6890 (1992).

[14] APCO v. FCC, 76 F.3d at 399.

[15] *See, e.g.*, APC at 1-4; Omnipoint at 1-5; AT&T at 2-5; Sprint Spectrum at 6. An alternative approach would be to shorten the voluntary negotiation period as proposed and (a) impose a good faith negotiation obligation on all parties (including incumbents) during this period and (b) require incumbents to allow immediate access to their systems so third-party appraisals can be performed — information that would prove invaluable in negotiations.

public.[16] Courts have already ruled that "the loss of rent-seeking potential is hardly a cognizable injury for consideration either by the FCC or by th[e] court[s]."[17] However, even if extortion were a cognizable interest, the private financial interest in attempting to secure super profits is more than outweighed by the public interest served by the rapid introduction of PCS and the injection of additional competition into the CMRS market.

II. Subject to Safeguards, Self-Relocating Microwave Incumbents Should be Permitted to Seek Reimbursement in Accordance with the Cost-Sharing Plan

Again to "expedite the deployment of PCS," the Commission proposes to allow self-relocating incumbents to collect from later-entrant PCS licensees that would have interfered with the self-relocated links reimbursement under the cost-sharing plan.[18] In making this proposal, however, the Commission expresses "concern" that incumbents would not have an incentive "to minimize [their relocation] costs if the incumbent knows in advance that it may be able to recover some of its expenses from PCS licensees."[19]

U S WEST was, at first blush, skeptical of this proposal. As one commenter has noted, "it is hard to imagine why an incumbent, armed with the enormous leverage of the [current] relocation rules, would ever undertake to relocate its own facilities. . . . [I]n the

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[16] *See* 47 U.S.C. § 157(a)("It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.").

[17] APCO v. FCC, 76 F.3d at 399 n.5.

[18] Further Notice at 46 ¶ 99.

[19] Ibid.

unlikely event that an incumbent could not exploit the relocation rules to their fullest, access to the cost-sharing plan could present the incumbent with the possibility of an arbitrage."[20]

This point is well taken. Nevertheless, on further consideration, and especially after reviewing the comments filed by some incumbents, U S WEST now believes that self-relocating incumbents should be permitted to participate in the cost-recovery plan. U S WEST has become convinced that such participation will facilitate system-wide relocations and, in the process, could expedite the deployment of PCS.[21]

The Commission's "gold-plating" concern is legitimate. Equally important is ensuring that, in permitting self-relocating incumbents to participate in the cost-recovery plan, the Commission does not create a perverse situation whereby incumbents no longer have an incentive to reach relocation agreements with PCS carriers.[22]

Several safeguards can be adopted to minimize these concerns. First, the same recovery caps (including the 2% limit on transaction costs) applicable to other plan participants should be extended to self-relocating incumbents.[23] Second, recovery should be permitted only on links which impose an interference problem (using the proximity

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[20] PrimeCo at 5.

[21] According to UTC, "numerous incumbents would avail themselves of the opportunity to participate in the cost-sharing plan if permitted." UTC at 9. The comments filed by incumbents support the proposition that system-wide relocations would be facilitated by extension of the plan to self-relocators. *See, e.g.,* AAR at 2; East River at 8-9; Santee Cooper at 2-3; Basin at 3-4; API at 2-3.

[22] *See, e.g.,* BellSouth at 7-8.

[23] *See, e.g.,* UTC at 7, 8; Williams Wireless at 11; CTIA at 7.

threshold test).[24] Third, recovery should be permitted only insofar as the self-relocating incumbent can document its costs.[25] Fourth, a rebuttable presumption should be established that costs claimed in excess of the average actual relocation costs are not reasonable.[26] Finally, there is no need to impose a trial period for self-relocated links.[27]

On the other hand, U S WEST agrees that self-relocating incumbents should be treated as an initial PCS relocator and that, consistent with the initial PCS relocator rules for out-of-service area relocations, self-relocator reimbursement should not be depreciated under the cost-sharing plan.[28]

U S WEST realizes that, even with these safeguards, self-relocating incumbents can receive more in compensation than would be the case if the relocation costs were agreed to in negotiations.[29] Nevertheless, gross abuses can be addressed in the dispute resolution process.[30] And the remaining "gold-plating" risk is, in U S WEST's judgment, offset by the likelihood that this adjustment to the current plan will accelerate clearance of the 2 GHz band.

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[24] *See, e.g.*, UTC at 7; CTIA at 7-8.

[25] *See, e.g.*, UTC at 7, 8; East River at 9.

[26] *See, e.g.*, UTC at 8; Santee Cooper at 3-4. For incumbents which make a system-wide change out as part of an agreement to move some of its links, the benchmark would be derived from the links moved as part of the negotiated agreement. For incumbents which replace their system without any agreement, the benchmark would be based on the national average cost.

[27] *See, e.g.*, PrimeCo at 6.

[28] *See* Further Notice at A.9 ¶ 17.

[29] *See, e.g.*, Sprint Spectrum at 3-4; Western Wireless at 6-7.

[30] *See, e.g.*, Basin at 4; AT&T at 6.

III. Conclusion

For the foregoing reasons, the Commission should eliminate entirely the voluntary negotiation period for the D, E, and F block PCS bands and permit incumbents to participate in the cost-sharing plan, subject to certain safeguards specified above.

Respectfully submitted,

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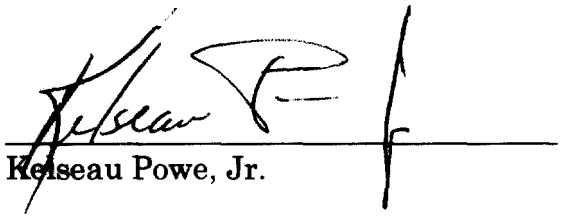
June 7, 1996

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 7th day of June, 1996, I have caused a copy of the foregoing **U S WEST REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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